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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

JESSE F. BOWERS,

Petitioner,

vs.

MISSOURI STATE EMPLOYEES'
RETIREMENT SYSTEM
BOARD OF TRUSTEES,

Respondent.

On Petition for Writ of Certiorari
To The Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JESSE F. BOWERS
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St. Louis, Missouri 63101
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PRO SE for Petitioner

34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether The United States District Court erred in declining to exercise subject matter jurisdiction, federal question, 28 U.S.C. Section 1331 over state law claim from State of Missouri because the Court alleges no federal claim was properly asserted when the jurisdiction of federal court of controversy arising under constitution of laws of the United States is not defeated by the possibility that the averments of the complaint might fail to state a cause of action on which plaintiff could actually recover, for the failure to state a proper cause of action calls for judgment on the merits and not for a dismissal for want of jurisdiction?

2. Whether the Circuit Court of the State of Missouri abridged the privilege and deprived petitioner of his liberty or property without due process of law or equal protection of the laws by denying petitioner of his constitution rights to have an official courtroom hearing?

3. Has petitioner's Fifth Amendment property rights been violated by Missouri State Employees' Retirement System?

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Jesse F. Bowers, Plaintiff-Appellant v. Missouri State Employees' Retirement System Board of Trustees, Defendant Appellees, United States Court of Appeals for the Eighth Circuit, Case No. 96-3185WMJC

STATEMENT OF JURISDICTION

1. The Judgment sought to be reviewed was filed by the United States District Court for the Western District of Missouri on July 9, 1996.

2. Appeal from the United States District Court for the Western District of Missouri.

3. Petitioner's Petition for Rehearing was denied by the United Court of Appeals for the Eighth Circuit on July 7, 1997.

(iii) This Court has jurisdiction pursuant to 28 U.S.C. Section 1254 (1).

Cases and Statutes Involved

"Jurisdiction of federal court of controversy arising under constitution or laws of the United States is not defeated by the averments of the complaint might fail to state a cause of action on which plaintiff could actually recover for the failure to state a proper cause of action calls for a judgment on the merits and not for want of jurisdiction." Bell v. Hood 66 S.Ct. 773 (1946)

"Whether the complaint states a cause of action on which relief can be granted is a question of law and, just as issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy." Jud. Code Section 24 (1), 28 U.S.C.A. Section 41 (1)

"It is established practice for the Supreme Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the state to do." Bell v. Hood 66 S.Ct. 773 (1946)

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts." Conley v. Gibson, 78 S.Ct. 99 (1957)

"How and when a case arises under the constitution or laws of the United States has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an elements, and an essential one, of the plaintiff's cause of action: Gully v. First Nat. Bank In Meridan (1936)

"The fundamental requisites of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652 (1950)

"District Court has jurisdiction, when to relief depends on construction or application of federal Constitution or statute." As a general rule when it appears from the bill or statement of plaintiff that the right to relief depends on the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, but rests upon a reasonable foundation, the District Court has jurisdiction of causes of action arises under the Constitution or laws of the United States." Smith v. Kansas City Title Trust Co., 41 S.Ct. (1920)

"Due process of law requires that every man shall have the protection of his day in court and the benefit of the general law, which hears before it condemns and proceeds not arbitrarily, but upon inquiry, and renders judgment only after trial." Truax v. Corrigan, 42 S.Ct. (1921)

"Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim arising under the Constitution, the Laws of the United States and Treaties made, or which shall be made, under their authority...U.S. Const., Art. III Section 2 and the relationship between that claim and the state claim permits the conclusion that the entire action before the court composes but one Constitution case. The

federal claim must have substance sufficient to confer subject matter jurisdiction on the Court." United Mine Workers of America v. Gibbs, 86 S.Ct. 1130 (1966)

STATEMENT OF THE CASE

Petitioner Jesse F. Bowers filed a civil law suit in the Missouri State Circuit Court of Cole County, Jefferson City, Missouri December 7, 1993 on Declaratory Judgment grounds.

The action arises from the acts of the Missouri State Employees' Retirement System Board of Trustees (MOSERS) who was directed through a Missouri Statute, Senate Bill Nos. 499, 576 & 639 by the 86th General Assembly effective August 28, 1992. Defendant MOSERS is a corporate body who exist pursuant to R.S. Mo. Section 104.320. Plaintiff is a retired Regional Manager for the Eastern Region of the Missouri Department of Mental Health, Division of Alcohol and Drug Abuse, Jefferson City, Missouri.

Plaintiff initially began employment with the State at the Missouri Institute of Psychiatry (MIP), an affiliate of the University of Missouri, June 15, 1969. In September of 1972 plaintiff was transferred to the Missouri Department of Mental Health. When plaintiff retired December 1, 1986, according to MOSERS the three years and two months of service at MIP was not transferable.

In an attempt to rectify the injustice to plaintiff and other former employees of MIP, the 86th General Assembly legislated Section 104.340-8 of statute Senate Bills Nos. 499, 576 & 639 that states:

> "Any retired member previously employed by the Missouri Institute of Psychiatry prior to July 1, 1974, and who by virtue of such employment was a member of a retirement system or plan other than the Missouri State Employees' Retirement System but did not become vested in that system or plan may make application to be made, constituted, appointed, and employed by the board as a special consultant on the problems of retirement, aging and other state matters. As compensation the special consultant shall receive beginning the month next following such appointment an amount equal to the retirement benefit the

> member would have been receiving had such service been included in the original retirement benefit calculations."

Plaintiff, as the statute specified, made application to MOSERS to be made, constituted, appointed and employed by the board as a special consultant in a letter to MOSERS June 22, 1992 requesting implementation of Sections 104.340-8 and 104.610 of Senate Bill Nos. 499, 576 & 639. Defendant responded in a letter dated August 7, 1992 accepting Section 104304-8 but rejecting Section 104.610. The Missouri constitutional statute that specifically directed MOSERS under the provision of Senate Bill Nos. 499, 576 & 639, Section 104.610 to pay:

> "Any person, who is receiving or hereafter may receive state retirement benefits from the Missouri State Employees' Retirement System - upon application to the board of trustees of the system from which he or she is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging and other state matters, for the remainder of the person's life and upon request of the board, or other state agencies where such a person was employed prior to retirement, give opinion in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly in an amount, which, when added to any monthly state retirement, shall be equal to the state retirement benefits the person would be currently receiving if he had benefitted from the law."

Plaintiff met the above qualifications in that he is currently and has been receiving benefits since December 1, 1986. Plaintiff also benefitted in the changes of the law through Section 104.340-8 of said statute. Having met those qualifications, plaintiff applied to MOSERS for increase benefits through changes in the law. MOSERS responded August 7, 1992 stating that plaintiff's benefits would change from $335 to $712.98 monthly but Section 104.610 was not applicable. Plaintiff objected and a controversy ensued. At this date, petitioner should have been receiving a sum equal to his currently monthly pension benefits since August 28, 1992 from Section 104.610 ($900.00). See Appendix G.

This case has gone through all the state circuit courts of Missouri, Western District Court, Appeals Court and now this Court and defendant has not addressed Section 104.610 in their brief. Petitioner addressed this issue in his brief in the Western District Court and defendant ignored it. The court did not award the merits of the case. See Jud. Code Section 24(1), 28 USCA (41) (1)

After plaintiff and defendant could not agree as to the correct interpretation of the said statute plaintiff filed Missouri State Supreme Court Rule 87.01, 87.02, Declaratory Judgment.

However, the State Circuit Court of Missouri violated plaintiff's fourteenth and fifth amendment rights by denying plaintiff a courtroom hearing. Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652 (1950)

The fundamental requisite of due process is the opportunity to be heard. Chief Judge Byron L. Kinder decided in his chamber without the plaintiff present to grant defendant motion to dismiss for lack of subject matter jurisdiction and notified plaintiff by the United States Mail.

REASONS FOR GRANTING THE WRIT

In ruling that the "district court correctly dismissed Bower's complaint for failure to state a federal cause of action," the Eighth Circuit Court of Appeals has set a precedent which conflicts with the decision of the Supreme Court announced in Bell v. Hood 327 U.S. 678 (1946) and also conflicts with the Third Circuit court of Appeals, Growth Horizons, Inc. v. Delaware County, PA 983 F.2d 1277 (3rd Cir. 1993). That the Eighth Circuit Court of Appeals overlooked and misconstrued the constitutional issues of the Appellant. That the action of the State Circuit Court of Cole County, Missouri arose under the Constitution or laws of the United States. A violation of plaintiff's fourteenth amendment rights.

On Law Day February 14, 1994 plaintiff and defendant appeared in chamber before Chief Judge Byron L. Kinder. Plaintiff asked for a date, time, and a courtroom hearing on the complaint. Missouri Supreme Court Rules 87.01 and 87.02 states that:

"Any person whose rights, status, or other legal relation are effected by a statute... may have determined any question of construction or validity arising under the instrument status... obtain a declaration of rights, status or other legal relation thereunder."

Judge Kinder said he would take the brief under advisement and get back with us.

Two weeks later, the Court in the absence of plaintiff sent a letter dated March 2, 1994 "the Court again takes up this matter and finds the issues in favor of the defendant and against plaintiff for reason of lack of subject matter jurisdiction." "A judgment entered without jurisdiction is void and may be attached collaterally." Angle v. Owsley 332 S.W. 2d 457 (1959)

Plaintiff did not receive any notice from the clerk or Court notifying him of a courtroom hearing regarding his complaint. The Court violated plaintiff's fourteenth amendment rights and MOSERS violated plaintiff's fifth amendment right by not complying with Section 104.610 of the statute by withholding the monthly payment it was obliged to pay since August 28, 1992.

"The fundamental requisite of due process of law is the opportunity to be heard Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652 (1950)

"Due process of law requires that every man shall have the protection of his day in court and the benefit of the general law, which hears before it condemns and proceeds not arbitrarily, but upon inquiry, and renders judgment only after trial." Truax v. Corrigan 42 S.Ct. (1921)

"Article V. Judicial Department Section 14(a) of the Missouri Constitution states that the Circuit Court shall have exclusive

jurisdiction in all civil cases. Such courts shall sit at times and places in each county as prescribed by law."

"Article I. of the Constitution of Missouri Section 14. Open Courts - certain remedies, justice without sole denial or delay. The Courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sole denial or delay."

According to the Missouri statute V.A.M.S. Section 104.530 states that the Circuit Court located in Jefferson City, Cole County, Missouri states:

"MOSERS may sue or be sued in its official name and that the service of all legal process shall be served on secretary at MOSERS' office and all suits against the system shall be brought in Cole County, Missouri."

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." XIV Amendment

Byron L. Kinder, Presiding Judge of the 19th Judicial State Circuit Court, Jefferson City, Missouri violated the fourteenth amendment rights of the petitioner by denial of the equal protection of the law. Petitioner was denied a courtroom hearing according to the Missouri Constitution and the Fourteenth Amendment of the United States.

Defendant MOSERS violated petitioner's Fifth Amendment Rights by depriving him of his property rights without just compensation by refusing to comply with the statute Senate Bill Nos. 499, 576 & 639, Section 104.610 that specifically directed MOSERS to pay $712.99 to

> "Any person, who is receiving or hereafter may receive state retirement benefits from the Missouri State Employees' Retirement System - upon application to the board of trustees of the system from which he or she is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, against and other state matters, for the remainder of the person's life and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits on his retirement, shall be equal to the state retirement benefits the person would be receiving currently if he had benefitted from the law."

Petitioner met the above qualification because he was and is receiving state retirement benefits and had benefitted in an increase and change in the law through Section 104.340-8 of Senate Bill Nos. 499, 576 & 639. Having met the above qualifications, plaintiff applied to MOSERS for an increase in benefits through changes in the law. Section 104.340-8 and Section 104-610. MOSERS responded August 7, 1992, stating that plaintiff benefits under Section 104.340-8 would change from $335.25 to $712.98 monthly but Section 104.610 would not apply.

Defendant MOSERS has not addressed any of its briefs to Section 104.610 of Senate Bill Nos. 499, 576 & 639. The Western District Court was advised that MOSERS was ignoring Section 104.610 of the said statute.

While this case, No. 95-4306-CV-C9, was in the Western District Court, plaintiff, pursuant to Federal Rules of Civil Procedure 56(a), moved the Court September 19, 1995 for Summary Judgment. Plaintiff offered in evidence a copy of the Missouri statute Senate Bill Nos. 499, 576 & 639, Section 104.610 which was an essential element to plaintiff's cause of action.

Defendant did not provide any argument or evidence to controvert the proof of Missouri Statute Senate Bill Nos. 499, 576 & 639, Section 104.610. The Court according to said rule must grant a Summary Judgment to plaintiff. The evidence made the case Prima Facie and provided the District Court the jurisdiction to rule on the merits of the case.

Historically, MOSERS has been resistant against pensioners. In the matter of Crain v. Missouri State Employees' Retirement System, 613 S.W.2d 912 (MO. App. 1981):

> "A class action was brought by judges, retired judges, commissioners and retired commissioners of the state judicial and their dependents and beneficiaries, against state retirement system, its statutory trustees, the Commissioner of Administration, and the State Treasurer, seeking a declaratory judgment that class members were entitled to receive certain retirement compensation and other benefits. On defendant's motion, the 19th Circuit Court, Cole County, Jefferson City, James T. Riley, J., dismissed the petition for failure to state a cause of action, and the class appealed. The Court of Appeals, Dixon, J.' held that the pleaded statutes and constitutional provisions required construction in order to determine the rights and benefits of the class which precluded a dismissal for failure to state a cause of action. Reversed and remanded for further proceedings."

Defendant MOSERS' refusal to comply with the statute Senate Bill Nos. 499, 576 & 639, Section 104.610 is fraudulent. Guidelines from the Missouri Supreme Court in the matter of Wolff Shoes Company v. Director of Revenue 762 S.W.2d 29 (Mo. banc 1988) stated that:

> "Primary rule of statutory construction is to ascertain intent of legislature from language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning."

CONCLUSION

The Supreme Court should grant the Petition for a Writ of Certiorari. The unpublished decision of the United States Court of Appeals for the Eighth Circuit conflicts with the Supreme Court decisions set forth in Bell v. Hood 66 S.Ct. 773 (1946); Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652 (1950); Conley v. Gibson, 78 S.Ct. 99 (1957); and United Mine Workers of America v. Gibbs, 86 S.Ct. 1130 (1966). The United States Western District Court erred in declining subject matter jurisdiction to petitioner. The laws cited in previous Supreme Court cases say so.

Petitioner pray that this Court reverse the Judgment of the Eighth Circuit and Western District Court and remand for further proceedings in the Western District Court calling for Judgment on the merits and not for a dismissal for want of Jurisdiction. And whether petitioner's complaint below stated a cause of action on which relief could be granted is a question of law and , just as issues of fact, it must be decided after and before the court assumed jurisdiction over the controversy. Jud. Code Section 24(1), 28USCA Section 41(1); Truax v. Corrigan 42S.Ct. (1921). And finally punitive damages, fees and for such other relief as this court deems just and proper.

Respectfully submitted,

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PRO SE for PETITIONER

APPENDIX A

FILED
DEC 07 1993
LINDA L. ROARK
CLERK CIRCUIT COURT
COLE COUNTY, MISSOURI

STATE OF MISSOURI)
) SS
COLE COUNTY)

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

JESSE F. BOWERS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Cause No. CV193-1584CC
	)	
MISSOURI STATE EMPLOYEE'S RETIREMENT SYSTEM BOARD OF TRUSTEES, DUANE BENTON, CHAIRMAN,	)	
	)	
Defendants.	)	

UNLAWFUL ADMINISTRATION OF PENSION BENEFIT PLAN AND SENATE BILLS NOS. 499, 576 AND 639 AUGUST 28, 1992

Comes now Plaintiff and as and for his cause of action against Defendant states as follows:

1. Jurisdiction of this Complaint is from the Missouri Constitution, Title VIII Chapter 104, Retirement of State Officers and Employees. Section 14 Article V, Supreme Court Rule 87, 87.01, 87.02, 87.06 and 87.09 Declaratory Judgments and Section 104.480.

2. Plaintiff is a retired regional manager for the Eastern Region of the Missouri Department of Mental Health, Division of Alcohol and Drug Abuse.

3. Defendant is the Missouri State Employee's Retirement System Board of Trustees (MOSER).

4. Plaintiff initially began employment with the State of Missouri at the Missouri Institute of Psychiatry (MIP), an affiliate of the University of Missouri, June 15, 1969. In September of 1972 Plaintiff was transferred to the Department of Mental Health. But according to MOSER at that time, the three years and two months of service at MIP was not transferable. Therefore when Plaintiff retired December 1, 1986, three years and two months of creditable service was denied by MOSER.

5. In an attempt to rectify the injustice to Plaintiff, the 86th General Assembly legislated Section 104.340-8 of Senate Bills Nos. 499, 576 and 639 that states:

> "Any retired member previously employed by the Missouri Institute of Psychiatry prior to July 1, 1974, and who by virtue of such employment was a member of a retirement system or plan other than the Missouri State Employees' Retirement system but did not become vested in that system or plan may make application to be made, constituted, appointed, and employed by the board as a Special Consultant on the problems of retirement, aging and other state matters. As compensation the Special Consultant shall receive beginning the month next following such appointment an amount equal to the retirement benefit the member would have been receiving had such service been included in the original retirement benefit calculation."

6. Plaintiff, as the statute specified, made application to the MOSER Board to be made, constituted, appointed, and employed by the board as a special consultant, in a letter to MOSER June 22, 1992 requesting implementation of sections 104.340-8, and 104.610 of Senate Bill Nos. 499, 576 and 639. Defendant responded in a letter dated August 7, 1992 rejecting Plaintiff request. The fact is Defendant refused to implement a lawful constitutional document of the State of Missouri

7. Section 104.610 of said statutes states:

"Any person who is receiving or hereafter may receive state retirement benefits from the Missouri State Employees' Retirement system... upon application to the board of trustee of the system from which he or she is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a Special Consultant on the problems of retirement, aging and other state matters, for the remainder of the person's life, and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions, and be available to give opinions in writing or orally, in response to such requests, as may be required, and for such services shall be compensated monthly in an amount which when added to any monthly state retirement benefits received on his retirement, shall be equal to the state retirement benefits the person would be receiving currently if he had benefitted from changes in the law effecting increases in the rate in the formula for calculating benefits in his respective retirement system."

Senate Bills Nos. 499, 576 and 639, Sections 104.340-8 and 104.610.

"Thus any judicially determined right to a benefit or lack of benefit based upon the construction of the operative statutes would be binding upon the System and its statutory trustees."

"There can be no question that when an issue arises concerning the benefits due under the section of the statute relating to judicial or other retirement benefits which are to be administered by the Missouri State Employees' Retirement System, the defendants named in this suit are the proper parties."

Crain v. Missouri State Employees' Retirement System 613 S.W. 2d 912 (Mo. App. 1981)

> The Judicial function of statutory interpretation is not limited by the nature of the statute being construed.
>
> Any person ... whose rights, status or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under ... the statute ... and obtain a declaration of ... statue ... thereunder."

8. According to Section 104.610 Plaintiff's monthly retirement should have been $712.99 x 2 = $1,425.98. Agee v. Armour Food Co. 672 F. Supp. 1210 (WD Mo. 1986 states:

> "The Eighth Circuit court of Appeals has identified various criteria by which to adjudge an administrator's acts arbitrary and capricious. Trustees who impose a standard not required by the plan itself act arbitrarily. Morgan v. Mullins, 643 F 2nd 1320, 1321 (8th Cir. 1981); Maness Williams, 513 F 2d 1264, 1267 (8th Cir. 1975); Wilken v. AT&T Technologies, Inc., 632 F. Supp. 772, 774 (ED. Mo. 1984). Morgan adds that it is arbitrary and capricious for the trustees; interpretation of the Plan to be inconsistent with the plain works of the document containing the plan's terms or if that interpretation frustrates the purpose of the plan or makes some of the words of that document superfluous. 643 F 2d at 1324. Even a consistent interpretation, if unreasonable from the beginning, is arbitrary and capricious."

WHEREFORE, Plaintiff has provided this Court with facts and case law evidence of unlawful administration of Senate Bills No. 499, 576 and 639. Plaintiff prays that this Court issues an order of Declaratory Judgment and prayer for relief and compliance with the lawful administration of Senate Bills No. 499, 576 and 639 in accordance with Section 104.340-8 and 104/610; that Plaintiff receive a retroactive payment of loss pay of approximately $32,000 and interest equal to the retirement benefit Plaintiff would have been receiving had such service been included in the original retirement benefit calculation; that Plaintiff receive monthly pension payment of approximately $1,425.96, as stipulated in Section 104.610, retroactive effective August 28, 1992

and that Defendant defray cost of attorney fees, Court cost and all other expenses in this litigation.

s/ Jesse F. Bowers
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APPENDIX B

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

FILED
JAN 12 1994
LINDA L. ROARK
CLERK CIRCUIT COURT
COLE COUNTY, MISSOURI

JESSE F. BOWERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. CV193-1584CC
	)	
MISSOURI STATE EMPLOYEE'S RETIREMENT SYSTEM	)	
	)	
Defendant.	)	

DEFENDANT MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM BOARD OF TRUSTEES' MOTION TO DISMISS

COME NOW defendant Missouri State Employees' Retirement System Board of Trustees ("MOSERS") and pursuant to Rule 55.27(a) of the Missouri Rules of Civil Procedure, moves this Court to dismiss the Petition filed by plaintiff Jesse F. Bowers ("Bowers"). In support of its motion, defendant states:

1. The Petition claims that Plaintiff if entitled to recalculation of his retirement benefit, and specifically seeks retroactive application of Rev.Stat.Mo. § 104.340(8) (1992) so that the statute is made to apply for the six year period prior to the date that law was enacted by the legislature. Rev.Stat.Mo. § 104.340(8), however, makes no provision for retroactive application. Moreover, Mo.Const. art. III, §§ 38(a) and 39(3) specifically prohibit retroactive application of the statute.

2. Accordingly, Plaintiff fails to state a claim upon which relief can be granted and the Petition must be dismissed. The issue raised is legal and can be decided on the basis of Plaintiff's Petition, the factual allegations of which can be assumed to be true for purposes of the motion.

3. The caption of Plaintiff's Petition refers to MOSERS and to "Duane Benton, Chairman" as Defendants, but paragraph 3 of the Petition states that the sole defendant is MOSERS. To the extent that Plaintiff intends to assert that Judge Benton (who is Chairman of the Board of Trustees of MOSERS) is a separate defendant, any claims against Judge Benton individually are barred because (a) he has not been served with process in this lawsuit; (b) no claims against him individually are pleaded in the Petition; and (c) even if any such claims were pleaded, they would be barred under the doctrine of official immunity.

4. Plaintiff began employment in June, 1969 with the Missouri Institute of Psychiatry ("MIP"). Petition ¶ 4. In 1972, Plaintiff transferred to the Department of Mental Health where he remained until his December 1, 1986 retirement. Petition ¶ 4. Because Plaintiff' MIP service had not vested at his retirement, MOSERS did not include it within his retirement benefits.

5. In order to benefit those individuals, like Plaintiff, whose MIP service did not vest upon retirement, the 86th General Assembly enacted Senate Bills 499, 575 and 639. Petition ¶ 5. Effective August, 1992, and upon application by the retiree, Rev.Stat.Mo. § 104.340(8) authorized MOSERS to adjust retirement benefits to include unvested MIP service and to do so based on Plaintiff's application to be a special consultant, with benefits to run from he date of application concurrently with Plaintiff's other retirement benefits. The statute, however, does not permit retroactive application. Indeed, any attempt to apply the statute retroactively violates Mo.Const. art. III, §§ 38(a), 39(3).

6. In June, 1992, Plaintiff applied for special consultant status. Petition at ¶ 6. In August, 1992, MOSERS accepted Plaintiff' application. Beginning in September, 1992, MOSERS implemented Rev.Stat.Mo. § 104.340(8) and adjusted Plaintiff's retirement check to reflect his MIP service. Plaintiff, however, maintains he is entitled to benefits under Rev.Stat.Mo. § 104.340(8) retroactively, beginning with the period starting December 1, 1986, when the statute was not in effect.

7. As of December 1, 1986, Plaintiff' MIP service did not vest and he was not entitled to receive any retirement benefits resulting from his MIP service. Only Rev.Stat.Mo. § 104.340(8) entitles Plaintiff to any benefits for his unvested MIP service. Rev.Stat.Mo. § 104.340(8), however, applies only from its effective date — August, 1992.

8. Retroactive application would violate Mo.Const. art. III, §§ 38(a) and 39(3). See State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. 1975). Retroactive application would constitutes the granting of public money to a private money to a private person in violation of § 38(a). Furthermore, retroactive application would grant an extra allowance to a public officer after service has been rendered in violation of § 39(3). Therefore, the Missouri Constitution prohibits the statute's retroactive application.

9. Conspicuously absent from the Petition are any fact establishing the General Assembly either intended the statute's retroactive application or intended to avoid Mo.Const. art. III, §§ 38(a) and 39(3). Failure to allege these facts is fatal to the cause of action Plaintiff attempts to plead in the Petition.

10. Moreover, the statute of limitations bars this lawsuit. The Petition in effect seeks review of an administrative decision rendered by MOSERS' Board. Rev.Stat.Mo. § 536.110.1 requires a party to appeal an administrative agency decision within 30 days. See, e.g., Reid v. Director of Revenue, 772 S.W.2d 28 (Mo. Ct. App. 1989). If the action is not brought within the thirty day period, the trial court no longer has subject matter jurisdiction, and the action is barred. Id.

11. On June 22, 1992, Plaintiff requested § 104.340(8) be applied retroactively to December 1, 1986. Petition ¶ 7. On August 7, 1992, MOSERS denied Plaintiff's request. Id. Five Hundred Sixty-Seven (567) days later, Plaintiff asked the Court to review MOSERS' decision. Clearly this action was not brought within the time limit. Therefore this Court lacks subject matter jurisdiction to consider the issue and must dismiss the suit.

WHEREFORE defendant Missouri State Employees' Retirement System moves this Court to dismiss plaintiff Jesse F. Bowers' Petition, to award the Missouri State Employees' Retirement System Board of Trustees attorneys' fees and for such other relief as this Court deems just and proper.

Respectfully submitted,

THOMPSON & MITCHELL

By s/Allen Allred
Allen D. Allred, #26367
Lawrence C. Friedman, #34382
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, first class mail postage prepaid, this 11th day of January, 1994 to Jesse F. Bowers, 1009 N. 11th, Apt. C., St. Louis, Missouri 63101.

s/Roger A. Killey

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

FILED
JUL 09 1996
R. F. CONNER, CLK.
U. S. DISTRICT COURT
WEST DISTRICT
OF MISSOURI

JESSE F. BOWERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 95-4306-CV-C-9
	)	
MISSOURI STATE EMPLOYEE"S RETIREMENT SYSTEM BOARD OF TRUSTEES	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

On August 8, 1995, plaintiff commenced this action against defendant Missouri State Employee's retirement System Board of Trustees (MOSERS). Plaintiff seeks a review of his case in this court after the Missouri Circuit Court dismissed for lack of subject matter jurisdiction plaintiff's request for a declaratory judgment that would require MOSERS to retroactively apply a 1992 Missouri statute that would increase plaintiff's retirement benefits. In the instant action, Bowers claims that the 1992 Missouri statute should apply retroactively to him and that when the Missouri Circuit Court dismissed his case, his constitutional rights were violated because a jury did not decide his case.

Defendant moves to dismiss the Complaint arguing that 1) this court does not have subject matter jurisdiction over plaintiff's claims; 2) plaintiff fails to state a claim upon which relief can be granted; and 3) the doctrine of res judicata bars plaintiff's claims.

I.
STANDARD FOR MOTION TO DISMISS

All factual allegations in the Complaint are to be taken as true as well as all inferences that reasonably may be drawn from those facts. Hishon v. King and Spalding, 467 U.S. 69, 72, 104 S. Ct. 2229, 2232 (1984). A Complaint should not be dismissed for failure to state a claim for relief unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957).

II.
FACTS

The following facts stated in the Complaint are deemed to be true for purposes of this motion:

Plaintiff Jesse F. Bowers is a retired Missouri state employee who has been receiving retirement benefits from MOSERS since 1986.

Defendant MOSERS is a "body corporate and an instrumentality of the state" of Missouri. Mo. Rev. Stat. § 104.320.

On December 7, 1993, Bowers filed suit against MOSERS in the Circuit Court of Cole County, Missouri, seeking a declaratory judgment that MOSERS had unlawfully denied plaintiff his pension benefits when it would not apply retroactively a Missouri statute that was passed in 1992. Retroactive application of the 1992 statute would have increased the amount of retirement benefits that Bowers receives from MOSERS.

On March 2, 1994, the Missouri Circuit Court granted MOSERS' Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff's Complaint, Ex. 3.

Bowers then appealed to the Missouri Court of Appeals. Because he failed to file a brief that complied with Missouri Supreme Court Rule 84.04, the Missouri Court of Appeals dismissed Bowers' claim. Bowers sought a transfer to the Missouri Supreme Court, which was denied.

Bowers filed this suit on August 8, 1995.

III.
DISCUSSION

Federal courts are courts of limited jurisdiction. Koll v. Wayzata State Bank, 397 F.2d 124, 127 (8th Cir. 1968). Unless jurisdiction is properly invoked, a federal court may not consider the case. Id. To establish subject matter jurisdiction, a plaintiff must show a basis for either diversity jurisdiction or federal question jurisdiction.

A district court has diversity jurisdiction over a civil action pursuant to 28 U.S.C. § 1332(a) when, among other things, the controversy is between citizens of different states. Plaintiff does not state anywhere in his Complaint the citizenship of the parties. Plaintiff is a resident of Missouri. However, residence is not the equivalent of citizenship. Citizenship may not be inferred from an allegation as to place of residence. Realty Holding Co. v. Donaldson, 45 S. Ct. 521 (1925). Because plaintiff has not properly pled a basis for diversity jurisdiction, the subject matter jurisdiction of this court must be founded on 28 U.S.C. § 1331, federal question jurisdiction.

To properly allege subject matter jurisdiction based on a federal question plaintiff must allege that his cause of action arises under the constitution, laws, or treaties of the United States. See 28 U.S.C. § 1331. Plaintiff alleges that the Fifth, Seventh, and Fourteenth Amendments were violated when his case was dismissed by the circuit court without a jury trial in violation of the Seventh Amendment of the United States Constitution.

Defendant MOSERS argues that because plaintiff's claim that his federal constitutional rights were violated fails to state a cause of action, plaintiff has not adequately alleged a proper basis for federal question jurisdiction. A federal court does not lack jurisdiction merely because of complaint fails to state a cause of action. Bell v. Hood, 66 S. Ct. 773 (1946). See also Continental Cablevision v. United States Postal Serv., 945 F.2d 1434, 1439 (8th Cir. 1991). Because plaintiff alleges violations of his federal constitutional rights, plaintiff has plead a sufficient basis for subject matter jurisdiction.

Defendant asserts that even if plaintiff has adequately pled a basis for federal subject matter jurisdiction, plaintiff has failed to state a claim upon which relief can be granted.

Many of the protections set forth in the Bill of Rights have been applied to the states through the Due Process Clause of the Fourteenth Amendment. Hamilton v. Schriro, 74 F.3d 1545, 1563 (8th Cir. 1996) (McMillian, J., dissenting); See also Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978). However, the United States Supreme Court has expressly declined to extend the Seventh Amendment right to a trial by jury to the states. Minneapolis & St. Louis Railroad Co. v. Bombolis, 36 S. Ct. 595, 596 (1916). Therefore, the Seventh Amendment to the United States Constitution was not violated when Bowers' case was dismissed by the Missouri Circuit Court without a jury trial.

The Fifth Amendment to the United States Constitution prohibits the federal government from depriving "any person of life, liberty or property without due process of law." Johnson v. Alexander, 572 F.2d 1219 at 1220. Bowers asserts that he has a property interest in the money allegedly due him by MOSERS. He argues that he was deprived of this property without due process because a jury did not decide his case. The federal government did not deprive Bowers of any property. therefore, the Fifth Amendment was not violated. Because neither the Fifth, Seventh, nor Fourteenth Amendments were violated by the Missouri state court's dismissal of plaintiff's case, plaintiff has failed to state a claim upon which relief can be granted on his federal claim.

Under 28 U.S.C. § 1367(c) (3), I may decline to exercise supplemental subject matter jurisdiction over state law claims if I dismiss all claims over which I have original jurisdiction. Construing plaintiff's Complaint broadly, Bowers alleges the following state law claims: 1) that his constitutional rights under Missouri's constitution were violated when he was denied the right to a jury trial; and 2) that MOSERS erroneously determined that it would not apply a Missouri statute to him retroactively.

Because no federal claim has been properly asserted, I decline to exercise supplemental jurisdiction over Bower's state law claims.

VI.
CONCLUSION

Accordingly, it is ORDERED that:

1) defendant's Motion to Dismiss is granted; and

2) this case is dismissed for failure to state a federal cause of action.

s/D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
July 9, 1996

APPENDIX D

19th JUDICIAL CIRCUIT, MISSOURI

Post Office Box 124
Jefferson City, Missouri 65102-0124

Byron L. Kinder
Presiding Judge
Circuit Judge, Division Two

Phone 314-634-9190
FAX 314-635-0796

March 2, 1994

Mr. Jesse F. Bowers
1009 North 11th Street, Apt. C
St. Louis, MO 63101

Mr. Allen D. Allred
Attorney at Law
One Mercantile Center, Suite 3400
St. Louis, MO 63101

Re: Jesse F. Bowers v. Missouri State Employees Retirement System Board, et al
Case No. CV193-1584CC

Gentlemen:

On this date I made the following docket entry in the above captioned case:

"The Court again takes up this matter, and finds the issues in favor of the defendant and against plaintiff for reason of lack of subject matter jurisdiction."

Yours very truly,
s/Byron Kinder
BYRON L. KINDER
CIRCUIT JUDGE, DIVISION TWO

STATE OF MISSOURI } SS
COUNTY OF COLE }

LINDA L. ROARK. Clerk of the Circuit Court of Cole County, Missouri
Hereby certify that the above and foregoing is a full true and correct copy of
Docket Entry
is fully as the same remains of record in my said office
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the
seal of my said office this 13th day of Oct. 1994
LINDA L. ROARK, Clerk

_____ By s/Sharon Gentys
Circuit Court of Cole County, Missouri Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3185WMJC

Jesse F. Bowers,	*	
	*	
Appellant	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Missouri State Employees' Retire-	*	
ment System Boar of Trustees,	*	
	*	
Appellee.		

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 7, 1997

Order Entered at the Direction of the Court:

s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3185WM

Jesse F. Bowers,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the Western
	*	District of Missouri
Missouri State Employees'	*	
Retirement System Board of	*	
Trustees,	*	[UNPUBLISHED]
	*	
Appellee.	*	

Submitted: May 23, 1997

Filed: June 3, 1997

Before McMILLIAN, FAGG, and LOKEN, Circuit Judges.

PER CURIAM.

Jesse F. Bowers brought this action against the Missouri State Employees' Retirement System Board of Trustees (MOSERS) claiming violations of his federal constitutional rights because MOSERS misinterpreted a Missouri statute that increased Bowers's retirement benefits and a state court ruled that it lacked subject-matter jurisdiction instead of reaching the merits of Bowers's claims for declaratory relief.

Having reviewed the record and the parties' briefs, we conclude the district court correctly dismissed Bower's complaint for failure to state a claim under federal law. See Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995); Chesterfield Dev. Corp v. City of Chesterfield, 963 F.2d 1102, 1105 (8th Cir. 1992). Likewise, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Bower's state law claims. See Willman v. Heartland Hosp. East, 34 F.3d 605, 613 (8th Cir. 1994), cert. denied, 115 S. Ct. 1361 (1995).

We affirm the district court. See 8th Cir. R. 47B.

MOSERS's motion for damages and costs is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX G

MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM
906 LESLIE BOULEVARD
JEFFERSON CITY, MISSOURI 65101

Telephone: 314-751-2342

MAILING ADDRESS
P.O. Box 209
Jefferson City, Missouri 65102

M. Steve Yoakum
Executive Director

Rosemary Eppenauer
Assistant Executive Director

Ron Meyer
Assistant Executive Director

Jesse F. Bowers
1009 N. 11th, Apt. C
St. Louis, MO 63101

September 9, 1992

SSN 338-16-4094

Dear Mr. Bowers:

I have prepared the requested information on how your retirement benefit was calculated.

The service from June 16, 1969 to August 24, 1972 with the Institute of Psychiatry has been added to your 12 years, 10 months and 19 days of service for a total of 16 years and 6 months.

Average Compensation		Years/Months		Percentage		Base Benefit
$2,360.53	x	16.5	x	01.3333	=	$519.30 (per month)

COLA	Amount Paid	Amount Due
12/01/86	$244.19	$519.30
12/01/87 1.04000	253.96	540.07
8/01/88 form. incr.	273.42	581.45
9/01/88 form. incr.	285.71	607.58
12/01/88 1.04000	297.14	631.88
12/01/89 1.04000	309.03	657.16
12/01/90 1.04000	321.39	683.45
12/01/91 1.04322	335.28	712.99

If you have any questions regarding the above, please let me know.

Sincerely,
s/John Ousley
Benefit Specialist Supervisor